Supreme Court, U.S.
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IN THE
UNITED STATES SUPREME COURT
October Term 1988

Case No. 88-783

PETER DAVID VANDERCREEK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether any of the so-called automobile exceptions permit a warrantless search of the interior of petitioner's automobile for objects not externally visible where the locked automobile was lawfully parked on petitioner's home property immediately adjacent to his residence.

2. Whether state prosecutor's improper jury arguments falsely accusing petitioner's counsel of subordination [SIC] of perjury e.g. "manufactured, contrived and fabricated defenses put together by experienced criminal defense lawyers" violated petitioner's due process right to fair trial.

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The decision of the Florida Second District Court of Appeal is reported as Vandercreek v. State, 531 So.2d 719 (Fla. 2d DCA 1988).

JURISDICTION

The per curiam affirmance of the petitioner's judgment precluded the petitioner from obtaining any possible jurisdiction in the Florida Supreme Court. Jenkins v. State, 385 So.2d 1356 at 1359 (Fla. 1980). As such, the Florida Second District Court of Appeal is the court of last resort for direct proceeding in Florida in the instant case. This Court may entertain the constitutional issues presented pursuant to 28 U.S.C. section 1257(3).

STATEMENT OF THE CASE

The petitioner was charged with first degree murder of Dion Grant. (R 1125-1126) The evidence adduced at trial overwhelmingly proved that the petitioner shot and killed Dion Grant, and as such, the petitioner's sole tactic at trial was to establish the defense of justifiable use of force (self-defense).

The state presented evidence in its case in chief that the petitioner and Dion Grant were homosexual lovers (R 141-142), that the shooting of Dion Grant by the petitioner had been preceded by Grant's kissing and dancing with Carlos Gonzalez (R 52-53), the petitioner's apparent irritation with Grant's actions (R 54), that there was an argument between the petitioner and Dion Grant during the ride to the petitioner's residence which resulted in the petitioner being cited for careless driving (R 74), and the shooting

of Dion Grant a few minutes after the conclusion of the traffic stop outside the petitioner's residence (R 79-80). Police officer Myers, the first officer to respond to the police radio broadcast and the officer who issued the preceding traffic citation to the petitioner, testified that upon arriving at the scene the petitioner exited his residence and stated "he is dead" (R 88). The petitioner's clothes were not torn, his hair was not messed and there were no visible signs of scratches, abrasions or bruises at this time (R 90). The petitioner was immediately arrested and searched for a weapon (R 972). Officer Myers then pushed the residence door open and observed Holly Vandercreek, the petitioner's sister, in the residence (R 91). Myers was informed by Holly Vandercreek that the petitioner entered the residence after the shooting without a gun (R 997). Myers attempted to check the

petitioner's vehicle for the murder weapon but the doors were locked (R 980). A search of the surrounding area failed to produce the weapon (R 97, 993).

The crime scene consisted of a parking lot which served numerous duplex apartment units (R 1193). The victim's body was found in the area between the parking lot and the petitioner's duplex unit (R 1195). The victim was without his shoes, there were blood splatterings on the petitioner's car, there were six bullet casings found around the car and the victim had been shot four times (R 293, 990, 992, 1006). As a result of the above evidence, the investigating officer believed that both the gun and the victim's shoes were in the petitioner's car (R 998, 1008). The petitioner's car was impounded and a search warrant was sought by the police. However, the car was subsequently searched without obtaining a warrant after the police were

apprised by a representative of Office of the State Attorney that a warrant was unnecessary (R 1019). This search produced both the murder weapon and the victim's shoes (R 1035-1038).

In response to the anticipated defense of justifiable use of deadly force, the state presented evidence that the victim had been shot two times in the front, two times in the back and that all four shots were probably fatal (R 371-372). It was further stipulated that the victim was 5'6" tall and weighed 123 pounds at the time of death (R 386, 391-392).

The petitioner testified that he had a motorcycle accident in Tampa on June 2, 1982 (R 404). Prior to this accident, the petitioner and Dion Grant had become lovers and had lived together (R 414-416). After living together for 3-4 months, the petitioner and Grant became involved in a fight during which the police were called

(R 418-419). Grant moved out after the fight and returned a month later (R 419-420). After living together for another four month period, Grant left because of another fight (R 420-421). Subsequently, the petitioner received a back injury as a result of his motorcycle accident and moved to Tallahassee for 14 months for the purpose of receiving rehabilitation treatment (R 405-406). The petitioner returned to Tampa in September of 1983 and began living with Grant again (R 406, 422-423). The petitioner informed Grant that there could not be any further fights because of the petitioner's back injury (R 424). In March of 1984, the petitioner and Grant became involved in another fight which required a police response (R 425-426). Grant moved away because of this fight (R 424). Grant and the petitioner resumed their relationship that same month. However, they never lived together again (R 427, 429).

In July of 1985, the petitioner went to visit Grant at Grant's residence. After staying there for a few hours, the petitioner became angry because he believed that Tommy Gay had stolen his money (R 474). After Grant interceded on the petitioner's behalf, the petitioner went outside and demanded his money (R 476). Thereafter, petitioner fired shots into the air and at the house (R 476-477).

The petitioner testified that on the night of the shooting the petitioner and Grant were returning from a bar when Grant decided that he wanted the petitioner to buy him a hamburger (R 440-442). When the petitioner refused to buy Grant a hamburger, Grant grabbed the steering wheel. This caused damage to the petitioner's car and resulted in the petitioner receiving a traffic ticket (R 446-447). After driving further, Grant was told by petitioner to get out of the car and walk home (R 448). When Grant

refused to exit the car, the petitioner told Grant that he could walk home from the petitioner's house. Upon arriving at the petitioner's residence, Grant began approaching the petitioner while saying he was going to get the petitioner (R 452). The petitioner fired two warning shots and then shot Grant because he was afraid that Grant would take the gun and use it on the petitioner (R 453).

The prosecutor initiated his closing argument by stating: (1) that the jury must "look beyond the manufactured, contrived and fabricated defenses put together by experienced criminal defense lawyers" and (2) I'm here to tell you that the defense of self-defense in this case is manufactured and contrived and the reason that I tell you this is because it's totally and completely, totally and completely dependent upon the testimony of Peter David Vandercreek, totally" (R 634). The prosecutor went on to argue motive,

the crime scene facts and past manifestations of superior strength over Grant by petitioner (R 635-636). Thereafter, the prosecution argued that petitioner chose not to present the testimony of the medical doctor who had treated the petitioner for his back injury and that the petitioner chose to rely on his own testimony "to raise, to create, to manufacture self-defense" (R 637-638). The prosecutor further submitted that the petitioner's actions were manifestations of hostility rather than fear and analogized the acts of petitioner in taking Grant's life to previous uses of the gun by petitioner in situations of anger and frustration (R 641-643). As the prosecutor announced that he was coming to the conclusion of his argument the petitioner objected for the first time (R 661). At this time, the trial court noted that the objection occurred 48 minutes after argument had been initiated (R 661).

When the trial court asked the petitioner's counsel for specificity as to his grounds for mistrial, defense counsel delineated his reasons as follows: (1) it was improper for the prosecutor to tell the jury what defense counsel believed, (2) it was improper to argue an inference from the failure to present medical records since these matters were available to both sides, (3) it was improper to argue impeachment evidence for substantive purposes and (4) it was improper for the state to argue that they did have access to the petitioner's medical records (R 661-664). Thereafter, the petitioner's counsel categorized the above as manifesting prosecutorial misconduct warranting a mistrial (R 664). After questioning counsel why he waited so long to object, the trial court stated that the prosecutor's argument suggesting that the evidence was manufactured was ill-advised. However, the trial court denied the motion

for mistrial (R 666). Thereafter, the trial court gave the petitioner's attorneys the option of a curative instruction or the right to refute the prosecutor's statements in final summation (R 671-673). Petitioner's counsel chose to refute the prosecutor's allegations in summation (R 673).

In closing argument, the petitioner's counsel made specific reference to the prosecutor's allegations that the claim of self-defense was a contrived story and argued what the prosecutor said was not evidence and that such statements should not have been made (R 681). Petitioner's counsel went on to argue that defense counsel had confidence in the petitioner's version of the events (R 681).

The petitioner filed a Motion for New Trial and Renewed Motion for Judgment of Acquittal in which the petitioner again raised his claim of improper prosecutorial argument (R 1335-1336). During the

hearing on this motion, the trial court expressed the opinion that even if the objection by petitioner was sufficient to preserve the issue, a harsh curative instruction highly prejudicial to the state would have been sufficient (R 848); but that counsel chose to handle it in final rebuttal argument (R 847). The trial court also expressed the opinion that defense counsel's rebuttal argument offset the improper statements by the prosecutor (R 850). Thereafter, the trial court summarily denied the Motion for New Trial without an opinion (R 850-851, 1337).

REASONS FOR DENYING THE WRIT

I.

FLORIDA'S APPLICATION OF THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT IS CORRECT UNDER THIS COURT'S DECISION IN TEXAS V. WHITE.

The petitioner here argues that the decision of the Florida Second District Court of Appeal is in conflict with this Court's decision in Collidge v. New Hampshire, 403 U.S. 443 (1971). While some of the facts of this case are similar to ones in Collidge, the variation in facts makes the holding in Collidge inapplicable to this situation. In both Collidge and the instant case, the automobile was parked outside the residence, the car was impounded and taken to the police station, there was sufficient time to obtain a search warrant and the car was searched without a warrant at the police station. However, Collidge is distinguishable from the instant case for several reasons.

First, in Collidge, law enforcement had sufficient time to prepare for a deliberate police investigative search. Secondly, the Collidge decision specifically turned on the fact that there were no exigent circumstances which obviated the warrant requirement. In Collidge this Court specifically noted that there were no weapons or other facts involved which would otherwise make obtaining a warrant impractical. Collidge, 403 U.S. at 462.

Sub judice, law enforcement was making an immediate emergency response to a homicide crime scene and the vehicle was evidence of the crime in open view. Additionally, law enforcement was unable to find the handgun that was unquestionably within the immediate area, and they firmly believed that the weapon was in the petitioner's car.

Since Collidge, this Court has made it clear that a motor vehicle may be

searched absent exigent circumstances when there is probable cause to search the vehicle. Texas v. White, 423 U.S. 67 (1975). Particularly, this Court has rejected the argument that a motorhome has all the expectations of privacy of a residence when "the vehicle is so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle". California v. Carney, 471 U.S. 386 at 393 (1985).

In this case, the vehicle was readily operative and parked in a place used solely for transportation vehicles; it was not remotely possessing the characteristics of a residence. As such, the warrantless search of the petitioner's vehicle, accompanied by probable cause, was within the confines of the Fourth Amendment.

II.

THE IMPROPER CLOSING ARGUMENT BY THE PROSECUTOR WAS DETERMINED BY THE STATE TRIAL COURT TO HAVE BEEN HARMLESS IN LIGHT OF THE PETITIONER'S ARGUMENT IN SUMMATION.

The state trial court expressed the opinion that even if the objection by petitioner was sufficient to preserve the issue, a harsh curative instruction highly prejudicial to the state would have been sufficient to cure any error (R 848). However, defense counsel chose to make a rebuttal argument. The trial court found that this rebuttal argument offset the improper statements by the prosecutor (R 850). As such, the trial court made a harmless error determination in keeping with this Court's doctrine in Chapman v. California, 386 U.S. 18 (1967).

The Ninth Circuit Court of Appeals in Bruno v. Rushen, 721 F.2d 1193 at 1195 (9th Cir. 1983), a case relied on by petitioner to show conflict, applied the

Chapman harmless error standard to an erroneous prosecutorial argument. It is clear there is no conflict of decisions since the judgment in Bruno and the one now before this Court both use an analysis of harmless error. Respondent respectfully submits that the instant harmless error decision does not warrant certiorari review since this point turns on specific facts rather than a matter of law which is in need of this Court's clarification. See, Fry Roofing Co. v. Wood, 344 U.S. 157 (1952).

CONCLUSION

Whereas, the judgment of the Florida Second District Court of Appeal does not manifest conflict of opinions with any other Court and the questions presented are matters of law which are well established and decided contrary to the petitioner, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE
UNITED STATES SUPREME COURT
October Term 1988

Case No. 88-783

PETER DAVID VANDERCREEK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SECOND DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

A P P E N D I X
OF RESPONDENT

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY CRIMINAL DIVISION

STATE OF FLORIDA CASE NO: 85-11699

vs. DIVISION: "D"

PETER D. VANDERCREEK

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE having come before the Court upon the Defendant's Motion to Suppress to warrantless search of the motor vehicle seized at the scene of the crime, said search having been conducted at approximately 9:00 o'clock a.m. while said vehicle was impounded, which said search revealed the alleged weapon used in this homicide, and the Court having considered the motion of the defendant, together with his memorandum in support of same, the answer to the Motion to Suppress and Memorandum of Law filed by the State, the reply Memorandum to the State's Answer to Motion to Suppress, the supplemental authority of U.S. v. Hamilton, 792 Fed. 2d

837 (U.S.C.A. 9th Circuit 1986), and the defense's response to the State's supplemental authority, as well as the testimony of the witnesses presented to the Court and the other evidence presented, and the Court being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the Motion to Suppress is denied as there existed probable cause to believe that the car was, or contained, evidence of a crime and that the seizure without a warrant and subsequent search is justifiable under the "automobile exception", based upon the authorities cited to the Court. The vehicle contained blood smears or splots from the crime which had just occurred and officers had observed both the defendant and victim in the car less than one hour prior to the established time of the homicide. Since the vehicle was in plain view and the blood on the vehicle in plain view after the officers came upon the

premises under exigent circumstances, the seizure and search of the vehicle was justifiable without a warrant and the fact that the officers considered obtaining a search warrant before conducting the search is of no relevance.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida this 30th day of July, 1986.

/s/
CIRCUIT JUDGE

Copies furnished to:

State Attorney
Richard Pippinger, Esquire, Attorney
for Defendant

RECORD EXCERPTS

THE COURT: Fine. Get on to the point. Are you making a Motion for Mistrial or not?

MR. PIPPINGER: Your Honor, I don't want a mistrial attributable to the Defense.

THE COURT: Are you making a Motion for a Mistrial?

MR. PIPPINGER: Yes, Your Honor, I am.

THE COURT: State the specific grounds.

MR. PIPPINGER: Grossly and totally improper final argument by the State of Florida in three to four areas that I have mentioned.

The fourth area being the going back after seeing the medical records, going back and again saying they didn't have access to them. That is two aspects. The same one making for grossly improper final argument. I ask that the mistrial be attributable to the State and not the Defense.

THE COURT: How can you do that?

MR. PIPPINGER: Because they have caused it intentionally in my judgment, prosecutorial misconduct.

THE COURT: You are now accusing the State of prosecutorial misconduct?

MR. PIPPINGER: Yes, I am. I think the record speaks for itself, Your Honor.

THE COURT: Why did you lay and wait? Why the second Mr. Castillo mentioned about the doctors not being called, wasn't there an objection made right at the very first time he mentioned it?

MR. PIPPINGER: Your Honor, I hesitate, I hesitate to interrupt final argument because that jury was twelve people, every time, you know, thinks you're trying to hide something from them.

THE COURT: Then why did you wait? You ultimately objected.

MR. PIPPINGER: I had no choice when we got to four times, Your Honor. What am I supposed to do, object?

Your Honor, I object that Mr. Castillo says I know something about the case which is -- I mean it's just asking this jury to believe that I believe that I have been struck and that they have hit a sensitive nerve.

THE COURT: Commenting on the failure to produce a witness may or may not be a valid objection but it should have been made the second such a comment was made and not allow your opponent to continue and then after he goes into another area and now he is about ready to sum up and sit down and then mentions it once more and up you jump and now you object.

MR. PIPPINGER: He mentioned an extension of it. First he said asking to draw a comment on it and then he suggested what my response would have been and I felt tactically sitting along at that point that I'm going to tell this jury he has subpoena power just as much as I do. I made a decision to handle it that way.

Then he comes back when I jump up and suggests to the jury that he couldn't have subpoenaed the witnesses because he didn't know they existed, he couldn't find out where they existed and that is when I jumped up.

THE COURT: My recollection is that Mr. Castillo says I anticipate what Mr. Pippinger or Mr. Gross will do.

MR. PIPPINGER: That's correct --

THE COURT: Don't interrupt me.

MR. PIPPINGER: Excuse me, Your Honor, I agree. I apologize.

THE COURT: Now, lawyers sometimes get carried away and instead of saying the evidence will show that self-defense is a manufactured defense, a lawyer may use, I suggest it's manufactured, they know it. I don't find deliberate prosecutorial misconduct.

I do find that hindsight batting a thousand, the State would have been well advised not to use such language or such suggestion.

Your Motion for a Mistrial is denied.

Defendant's Motion for Judgment of Acquittal or Renewed Motion for Judgment of Acquittal is denied. The only grounds that the Court even considered in its own mind as being close was when the objection was made to Mr. Castillo's argument to this jury concerning manufactured evidence, et cetera, et cetera. The record speaks for itself as to the exact words set forth in the memorandums, and I'm certainly not going to redictate them into the record.

And this Court's recollection is that I gave defense counsel an opportunity to draft a curative instruction to the effect that it was improper and, Mr. Pippinger, you're correct, I gave you an alternative if you felt that a curative instruction would highlight it even more so, and you chose to handle it on final rebuttal. That was your decision.

I can visualize a curative instruction to that jury, ladies and gentlemen of the jury, you are instructed that Mr. Cass Castillo, although he may not have intentionally done so, has made a highly improper and unethical argument when he told you p-r-r-r-r-r and so forth. I'm sorry, the court reporter cannot take that.

So I probably could have, in front of this jury, given such a cautionary instruction that I would have overcautioned them to the prejudice of the State, depending upon however I'm going to go in telling that jury that what he said was improper, not to be considered.

And I'm firmly convinced that the rebuttal argument made by counsel for the defendant to Mr. Castillo's final summation completely offset Mr. Castillo's improper statements, and that this jury was not swayed by Mr. Castillo's comments directed to the defense, and that this jury intelligently considered the evidence in this case in light of this Court's instructions.

And when you look at the elements of Second Degree Murder, there was competent, substantial evidence before that jury from which the jury could have returned such a verdict.

Defendant's Motion for New Trial and Renewed Motion for Judgment of Acquittal is denied.